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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-1316

JAMES RUSSELL SWINNEY, III, Individually and on behalf of a class of persons known as the Civil Service Employees of Escambia County, Florida,
Petitioner,

versus

ROYAL J. UNTREINER, Sheriff of Escambia County, Florida; WILLIAM M. CHISOLM, WILLIAM G. CHAMPLIN, I. S. POWELL, J. L. TAYLOR, and TED CIANO, as members of the Civil Service Board of Escambia County, Florida; and CARL H. HARPER, County Solicitor of Escambia County, Florida,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI FROM A DECISION OF THE SUPREME COURT OF FLORIDA

William M. Chisolm, William G. Champlin, I. S. Powell, J. L. Taylor and Ted Ciano, as members of and constituting the Civil Service Board of Escambia County, Florida pray that this Court will deny the Petition for Writ of Certiorari sought herein.

ISSUE PRESENTED

Whether this Court should review a decision of the Supreme Court of Florida which sustained upon the facts in evidence the constitutionality of Section 23, Chapter 67-1370, Laws of Florida 1967, a provision of the Escambia County Civil Service Act which prohibits certain political activities by classified employees, against the allegation that said provision violates Petitioner's rights under the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner has set forth in his Appendix A (pp. A-1 A-4) the pertinent provisions of the Constitution of the United States and the provisions of Section 23, Chapter 67-1370, Laws of Florida 1967. The provisions of the various Laws of Florida cited herein to show the historical development of the present civil service system of Escambia County are not set forth at length in the Appendices attached hereto, but said laws are set forth by title only in Appendix A hereof.

STATEMENT OF THE CASE

These respondents adopt the statement of the case set forth in the petition, except such matters alleged which are conclusions of law and except in the following other important particulars:

1. The case proceeded to summary final judgment in the Circuit Court of Escambia County, Florida upon the Stipulation of the parties (See: Appendix B to this Brief) that all facts necessary for determination of the

issues were before the Court by affidavit or sworn complaint. Therefore, no evidence was before the Court except as set forth in the original complaint sworn to by Petitioner Swinney (See: Petitioner's Appendix B, pp. A-5 through A-16) and the various form affidavits of members of the class who Petitioner Swinney claimed to represent in the class action. (See: Petitioner's Appendix B, pp. A-25 through A-44).

2. The following facts alleged by Petitioner were not before the Court when it entered its summary final judgment:

a. That Petitioner Swinney was an actual candidate for election to the Florida Legislature.

b. That Petitioner Swinney was suspended from his job as a deputy sheriff.

c. That the Escambia County Civil Service Board ordered his dismissal.

3. Although the above facts are discussed in the dissent from the majority opinion of the Supreme Court of Florida (See: Petitioner's Appendix E (Exhibit 5) pp. A-55 through A-69), they were not properly before the Court for consideration.

REASONS FOR DENYING THE WRIT

Merit systems for county government employees are exceptions to the rule in Florida. Most counties do not have civil service systems, but rather retain the spoils system with all of its vicious inequities. Only Hillsborough, Escambia, Pinellas, Dade, Volusia and Bay Counties, and the City of Jacksonville which governs the area of Duval

County, of the 67 counties of Florida, have civil service systems for any group of their public employees.

Politically, the merit system for the employees of Escambia County remains in a very precarious position. At each session of the State Legislature since its original enactment bills have been introduced, most of which have been enacted into law, to amend the system so as to exclude more county employees from the classified service and to reduce the power of the Civil Service Board over personnel policies and practices.

Civil Service in Escambia County has had a turbulent history. The civil service system was originally adopted in 1951. Chapter 27537, Laws of Florida 1951. Prior to 1967 it was amended twenty times, at least once at each regular session of the State Legislature. Chapter 29058, Laws of Florida 1953; Chapter 30737, Laws of Florida 1955; Chapter 30738, Laws of Florida 1955; Chapter 30739, Laws of Florida 1955; Chapter 30741, Laws of Florida 1955; Chapter 30747, Laws of Florida 1955; Chapter 57-1297, Laws of Florida 1957; Chapter 57-1298, Laws of Florida 1957; Chapter 57-1299, Laws of Florida 1957; Chapter 57-1304, Laws of Florida 1957; Chapter 57-1305, Laws of Florida 1957; Chapter 57-1306, Laws of Florida 1957; Chapter 57-1307, Laws of Florida 1957; Chapter 59-1266, Laws of Florida 1959; Chapter 59-1272, Laws of Florida 1959; Chapter 61-2137, Laws of Florida 1961; Chapter 63-1313, Laws of Florida 1963; Chapter 63-1314, Laws of Florida 1963; Chapter 65-1518, Laws of Florida 1965.

In 1967 it was substantially revised and reinacted. Chapter 67-1370, Laws of Florida 1967. It has since been amended four times,

(Chapter 71-628, Laws of Florida 1971; Chapter 72-534, Laws of Florida 1972; Chapter 72-536; Chapter 72-538), at every subsequent regular session of the Legislature, except in 1969 when the Governor took the unprecedented action of vetoing two local bills (Senate Bills 1734 and 1735) which would have substantially reduced the power and independence of the Escambia County Civil Service Board. Our legislative delegation has verbally indicated the intent to again amend the law at the current session of the Legislature.

In 1970 the civil service system had to withstand its most serious attack, an attempt by the elected officials of the county to abolish it by county ordinance, pursuant to a presumed constitutional and statutory grant of "home rule" power. Davis v. Gronemeyer, 251 So. 2d 1 (Fla. 1971).

Quite naturally, the elected officials of the county, who have no tenure in office save that provided by political prowess, object to their lack of absolute control over the hiring, firing and pay of the county employees who work directly under them. They would much prefer that all of their employees support them politically and otherwise. They cannot be expected to accept passively a system which allows a classified employee, who is insulated by civil service status from the harsh realities of politics in his employment, to engage actively in political campaigns which may be antagonistic to the political interests of the elected officials of the county.

Moreover, the political interests of county elective officers are not confined to their own political campaigns. They depend on other local, state and federal elected officers for appropriations and other support

necessary to their political success, who in turn look to them for the "grass roots" support necessary for their success politically.

In contrast, however, with most state and federal elective officers, our county elected officials directly supervise classified employees. The Board of County Commissioners, the Sheriff, the Clerk of the Courts, the County Comptroller, the Tax Collector, the Tax Assessor, the Superintendent of Schools, the District School Board, Circuit Judges and County Judges all hold elective office and directly supervise classified employees under the Escambia County civil service system. A political controversy arising between an employee and his elective supervisor would directly affect the efficiency of government whether or not the employee actively engaged in campaigning during working hours. The Mitchell (infra) decision, at page 95 of 330 U.S. 75, recognized that:

> "The influence of political activity on government employees, if evil in its effect on the service, its employees or people dealing with them, is hardly less so because that activity takes place after hours."

Petitioner acknowledges that one cannot reasonably deny the need to limit some political activities of civil service employees. He alleges, however, that "the more remote [emphasis added] the connection between a particular activity and the performance of official duty, the more difficult it is to justify restriction on the ground that there is a compelling public need to protect the efficiency and integrity of the public service."

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However, the remoteness of supervision of classified employees under civil service by elective office holders is a more appropriate measure of the extent to which government should regulate the political activities of its employees who are protected by civil service.

Section 23, Chapter 67-1370, Laws of Florida 1967, which Petitioner here contends is unconstitutional, is an integral part of the Civil Service Act of Escambia County. It was adopted with substantially its present terms when the Civil Service Act was originally enacted. Section 23, Chapter 27537, Laws of Florida, 1951. It was amended in 1965 to its present form to include the prohibitions against seeking elective public office and serving in any elective or appointive position in any political party. Section 9, Chapter 65-1518, Laws of Florida 1965. It is a portion of the law which makes concessions to the elected officials who have the power, directly or indirectly, to continue or eliminate civil service in Escambia County. A Utah Court once described its workmen's compensation law as "a compromise made between the master and the servant, chaperoned by society, for the benefit of all". United Air Lines Transport Corporation v. Industrial Commission, 151 P. 2d 591 (Utah 1944). The Civil Service Law for Escambia County is analogous.

It may be that civil service for federal employees is so firmly emplanted, generally accepted and remote from elective office that it can survive the elimination of the relevant prohibitions of the Hatch Act. But the merit system for the classified employees of Escambia County has not yet evolved to that position; our politics are not that

sophisticated. If the invalidation of Section 23 would truly result in improving the lot of the public employees in Escambia County, the Civil Service Board would not be here resisting; the probable result, however, would be a total return to the spoils system since only the Legislature of Florida can assure the retention of the merit system for our county.

This Court recognized, in United Public Workers v. Mitchell, 330 U.S. 75, 67 S. Ct. 556, 91 L. Ed. 754, (1946), that practice, history and changing educational, social and economic conditions determine the extent to which governments may regulate the political activities of their employees.

The Legislature of the State of Florida has recognized a need to include the prohibitions of Section 23 in the Civil Service Act for Escambia County. The legislative delegation which represents Escambia County is in the unique position to best know the practice, history and changing educational, social and economic conditions of our county.

The turbulent history of civil service in Escambia County is the best evidence that the elective officials of the county are not yet so remote in the supervision of the classified employees under civil service that we can dispense with the prohibitions of Section 23.

Although our county has grown substantially within the recent past, from a population of 173,829 in 1960 to 205,334 in 1970, our system of local government has not changed as a result of the increased population and metropolitan area growth. On November 3, 1970 the voters of Escambia County rejected

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by a vote of 30,284 to 9,904 a proposed charter government which would have combined and modernized the governments of Escambia County, the City of Pensacola and several other municipalities within the county. Chapter 70-681, Laws of Florida 1970.

Petitioner has cited numerous decisions of this Court, which we acknowledge impose necessary and well reasoned limits upon the infringement of First Amendment rights, holding that the State must demonstrate a compelling interest, and not merely a rational relationship to some colorable state interest, in order to impose limits upon an individual's constitutional rights.

We submit, however, that there is a compelling state need to retain and encourage the enactment of merit systems for local government employees. Unless public employees, who are protected in their employment by these systems, are prohibited from engaging in the activity enjoined by Section 23, our elective representatives will not be encouraged to enact or retain merit systems for local government employees.

The efficient operation of government is maintained only through the employment of individuals who obtain and retain their employment by virtue of a system of merit rather than as a reward for political support.

The Mitchell (Supra) decision is still viable today particularly for local governments in which those who hold elective public office directly supervise public personnel who are protected by civil service systems.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the decisions of the Circuit Court of Escambia County, Florida and of the Supreme Court of Florida in this case are in accord with the decisions of this Court, as recently refined. Therefore, this Court should not review this cause.

Respectfully submitted,

HOBART O. WORLEY, JR., ESQ.
334 Brent Building
Pensacola, Florida 32501
904 - 432-2436
Counsel for Civil Service Board

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AFFIDAVIT OF SERVICE

STATE OF LOUISIANA]

PARISH OF ORLEANS]

Before me, the undersigned authority, this day personally appeared

_____

who being duly sworn on oath deposes and says:

1. I forwarded for filing this date 40 copies of this printed Brief in Opposition to Petition for Writ of Certiorari.

2. I served upon Paul Shimek, Jr., Esquire, 517 North Baylen Street, Pensacola, Florida 32501 and upon R. H. Merritt, Esquire, 105 Lawyers Building, Pensacola, Florida 32501, three copies each of the foregoing Brief in Opposition to Petition for Writ of Certiorari, by depositing the same in a United States post office or mail box, with first class postage prepaid, in accordance with Rule 33, Supreme Court Rules.

3. All parties required to be served have been served.

_____

Affiant

Sworn to and subscribed before me this _____ day of May, 1973.

_____

Notary Public, State of Louisiana

My commission expires: _____

INDEX TO APPENDICES

APPENDIX A
Laws of Florida showing the historical development of the Civil Service Act for Escambia County, Florida (by title only)

APPENDIX B
Stipulation

APPENDIX A

Chapter 27537, Laws of Florida 1951

AN ACT Providing for Civil Service for Specified Employees of Escambia County, Florida, Classifying and Specifying the County Employees to Come Within the Provisions of Said Law; Creating a Civil Service Board to Administer Said Law; Providing for the Appointment, Terms of Office, Authority, Compensation, Qualifications and Duties of the Members of Said Board; Giving Said Board Authority to Promulgate, Adopt and Amend Rules and Regulations for the Administration of Said Law; Providing for Public and Competitive Tests for Purpose of Establishing Employment Lists for Various Positions With Escambia County; Providing for Probationary Periods of Employment With Escambia County; Authorizing Said Board to Adopt and Promulgate Rules and Regulations Governing Practice and Procedure Before Said Board; Providing a Penalty for the Violation of Said Law or the Rules of Said Board; Providing for the Right of a Discharged or Suspended County Employee Coming Within the Provisions of Said Law to Have a Public Hearing as to the Cause of His Discharge; Authorizing Said Board to Make Certain Expenditures and to secure facilities and providing for Payment of Expenses Therefor by County Commissioners of Escambia County; Prohibiting Any Person Under Civil Service as Created by Said Law From Participating in Any Political Activities; Placing Limitations Upon Salaries to be Paid Certain County Employees and Authorizing and Requiring Said Board to Enforce Said Limitations and Requiring That No Decrease of Increase in the Salary or Salaries of Any Individual County Employee or Group of County Employees Shall be Effected Without the Approval of Said Board.

Chapter 29058, Laws of Florida 1953

AN ACT Relating to Civil Service for Employees of Escambia County, Florida; Amending Sections 5, 8, 22 and 24 of Chapter 27537, Laws of Florida, Acts of 1951; Providing for Classification and Specifying the County Employees to come within the Provisions of this Law; Providing for Restoration of Employees to the Civil Service by certain procedure; changing the amount of the appropriation to be made to carry out the provisions of this Law; defining "Appointing Authority".

Chapter 30737, Laws of Florida 1955

AN ACT relating to Civil Service employees of Escambia County; amending Section 17 of Chapter 27537, Special Acts of 1951; by adding a new paragraph at the end of the section, limiting the hours of work of such employees; requiring a certain work schedule of courthouse employees; and providing an effective date.

Chapter 30738, Laws of Florida 1955

AN ACT amending Sections 12 and 22, as amended, of Chapter 27537, Laws of Florida, Acts of 1951, entitled an Act providing for Civil Service for specified employees of Escambia County, Florida; classifying and specifying the county employees to come within the provisions of said law; creating a Civil Service Board to administer said law; providing for the appointment, terms of office, authority, compensation, qualifications and duties of the members of said board; giving said board authority to promulgate, adopt and amend rules and regulations for the

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administration of said law; providing for public and competitive tests for purpose of establishing employment lists for various positions with Escambia County; providing for probationary periods of employment with Escambia County; authorizing said board to adopt and promulgate rules and regulations governing practice and procedure before said board; providing a penalty for the violation of said law or the rules of said board; providing for the right of a discharged or suspended county employee coming within the provisions of said law to have a public hearing as to the cause of his discharge; authorizing said board to make certain expenditures and to secure facilities and providing for payment of expenses therefor by County Commissioners of Escambia County; prohibiting any person under Civil Service as created by said law from participating in any political activities; placing limitations upon salaries to be paid certain county employees and authorizing and requiring said board to enforce said limitations and requiring that no decrease or increase in the salary or salaries of any individual county employee or group of county employees shall be effected without the approval of said board; providing an effective date.

Chapter 30739, Laws of Florida 1955

AN ACT relating to Civil Service Laws of Escambia County; amending Chapter 27537, Laws of Florida, Special Acts of 1951; by adding Section 8 (a) and amending Section 8; providing for sick leave and accumulation of annual leave.

Chapter 30741, Laws of Florida 1955

AN ACT to amend paragraph (g) of Section 3, Chapter 27537, Laws of Florida, 1951, relating to Civil Service for certain specified employees of Escambia County, Florida, by including in unclassified service registered nurses employed by or under the supervision of Escambia County Health Department; fixing an effective date.

Chapter 30747, Laws of Florida 1955

AN ACT relating to the Civil Service Board of Escambia County; amending Section 2, Chapter 27537, Acts of 1951; providing for the Civil Service Board to employ a competent secretary and such other help necessary to carry out the purpose of the Board; providing effective date.

Chapter 57 - 1297, Laws of Florida 1957

AN ACT to amend the last and unlettered paragraph of Section 3, Chapter 27537, Laws of Florida, 1951, relating to civil service for certain specified employees of Escambia County and designating those employees and officers who comprise the classified service thereunder; fixing the effective date.

Chapter 57 - 1298, Laws of Florida 1957

AN ACT relating to the Escambia County Civil Service System; amending Section 22 of Chapter 27537, Acts of 1951, as amended by Chapter 30738, Acts of 1955, relating to the annual appropriations by the County Commissioners therefore; and providing an effective date.

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Chapter 57-1299, Laws of Florida 1957

AN ACT relating to the Escambia County Civil Service Board; amending subsection (b) of Section 4 of Chapter 27537, Acts of 1951, relating to disciplinary actions against employees violating the civil service law or rules and regulations promulgated thereunder; providing an effective date.

Chapter 57-1304, Laws of Florida 1957

AN ACT relating to Escambia County Civil Service employees; amending Section 17 of Chapter 27537, Acts 1951, as amended by Chapter 30737, Acts 1955, relating to hours of work and compensation for overtime work; and providing an effective date.

Chapter 57-1305, Laws of Florida 1957

AN ACT relating to the Escambia County Civil Service employees; amending subsection (g) of Section 3 of Chapter 27537, Acts 1951, relating to classification of certain health department and hospital employees; providing effective date.

Chapter 57-1306, Laws of Florida 1957

AN ACT relating to Escambia County Civil Service employment; amending Section 10 of Chapter 27537, Acts of 1951, relating to employees classified as laborers; and providing an effective date.

Chapter 57-1307, Laws of Florida 1957

AN ACT relating to Escambia County Civil Service employees; Amending Sections 8 and 8 (a) of Chapter 27537, Acts of 1951, as amended by Chapter 30739, Acts of 1955, relating to leaves and holidays; and providing an effective date.

Chapter 59-1266, Laws of Florida 1959

AN ACT amending Chapter 27537, Laws of Florida 1951, as amended by Chapter 57-1305, Laws of Florida 1957, relating to Civil Service for deputy sheriffs and employees of Escambia County, and providing certain exceptions from the classified service in the Sheriff's office; and fixing an effective date.

Chapter 59-1272, Laws of Florida 1959

AN ACT relating to Escambia County Civil Service employees; amending Section 8 of Chapter 27537, Laws of 1951, as amended by Chapters 30739, Laws of 1955, and 57-1307, Laws of 1957; providing an effective date.

Chapter 61-2137, Laws of Florida 1961

AN ACT amending Chapter 27537, Laws of Florida 1951, as amended by Chapter 57-1305, Laws of Florida 1957, relating to Civil Service for deputy sheriffs and employees of Escambia County, and providing certain exceptions from the classified service in the sheriff's office; and fixing an effective date, and referendum.

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Chapter 63-1313, Laws of Florida 1963

AN ACT relating to Escambia County civil service system; amending Section 22, Chapter 27537, Laws of Florida, 1951 as amended by Chapter 29058, 1953; Chapter 30738, 1955; and Chapter 57-1298, all Laws of Florida; relating to the annual appropriation by the county commissioners; providing an effective date.

Chapter 63-1314, Laws of Florida 1963

AN ACT relating to the county civil service of Escambia County; amending Sections 8 and 8 (a) of Chapter 27537, Laws of Florida; 1951, as amended by Chapter 57-1307, Laws of Florida; providing and regulating annual and sick leave; providing an effective date.

Chapter 65-1518, Laws of Florida 1965

AN ACT relating to Escambia county, civil service; amending Section 3 of Chapter 27537, Laws of Florida 1951, by adding subsection (h) thereto to provide classification of certain employees of the county board of public instruction; amending Section 4 (a) of Chapter 27537, Laws of Florida, 1951, relating to rules and regulations, legal effect and publication; amending Section 7 of Chapter 27537, Laws of Florida, 1951, to authorize appointing authorities, upon approval of the appropriating authority involved, to determine the number of employees necessary for their departments; amending Section 8 (a) (1) of Chapter 27537, Laws of Florida, 1951, as amended by Chapter 57-1307, providing for eligibility of certain former employees upon resignation to be placed on re-employment or employment lists; amending Section 9 of

Chapter 27537, Laws of Florida, 1951, providing for various types of employee tests, notice of the taking thereof, and waiver of parts thereof under certain circumstances; amending Section 10 of Chapter 27537, Laws of Florida, 1951, by deleting provisions for labor class, transferring to Section 10 from Section 17 board's present authority to delete certain unreasonable employment classifications; amending section 11 of Chapter 27537, Laws of Florida, 1951, providing for maintenance of separate employment and re-employment lists on temporary, seasonal and full time employment basis; providing effective date of appointments; providing for removal of name from eligibility lists under certain circumstances; amending Section 17 of Chapter 27537, Laws of Florida, 1951, providing for the preparation and adoption of a comprehensive pay plan for all positions in the classification service; providing for adoption of rules and regulations to effectuate such pay plan; prohibiting payment of compensation in excess of amounts specified; providing for rules for initial adjustment of pay scale of certain employees under certain circumstances according to the comprehensive pay plan; limiting additional compensation; amending Section 23 of Chapter 27537, Laws of Florida, 1951, prohibiting employees from participating in certain political activity and from seeking public office; providing an effective date.

Chapter 67-1370, Laws of Florida 1967

AN ACT relating to Escambia county; creating a county civil service system; providing for governing board; providing powers and authorities; requiring board to adopt rules and regulations; providing classification plan and conditions of employment;

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providing for expenditures; providing appropriations by county; providing an effective date.

Chapter 71-628, Laws of Florida 1971

AN ACT relating to Escambia County; amending portions of Chapter 67-1370, Laws of Florida, relating to the civil service board, to include certain job titles under exemptions from the classified service; providing that personnel provisionally appointed due to an insufficient re-employment or employment list be credited five (5) points on subsequent examination for the position held; providing that district school board employees may be reimbursed for one half of their accrued sick leave upon retirement; providing an effective date.

Chapter 72-534, Laws of Florida 1972

AN ACT relating to Escambia County; amending portions of Chapter 67-1370, Laws of Florida, relating to the civil service board; providing a maximum age limit for applicants and a compulsory retirement age for employees; eliminating restrictions on waiver of written tests by the board; providing for student employment; providing the board of county commissioners and district school board a vote in determining general, system-wide salary increases; providing restrictions on the payment of overtime; providing certification of payrolls; providing an effective date.

Chapter 72-536, Laws of Florida 1972

AN ACT relating to Escambia County;

amending portions of Chapter 67-1370, Laws of Florida, relating to civil service board, establishing a procedure for abolishment of positions in the classified service and providing for an appeal by incumbent employees in positions sought to be abolished; providing an effective date.

Chapter 72-538, Laws of Florida 1972

AN ACT relating to Escambia County; amending portions of Chapter 67-1370 and 71-628, Laws of Florida, relating to civil service board, to give the district school board flexibility in its organizational structure to change the title of positions without the necessity of a change in law; providing an effective date.

IN THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY,

STATE OF FLORIDA

Case No. 72-1310

JAMES RUSSELL SWINNEY, III, individually and on behalf of a class of persons known as the Civil Service employees of Escambia County, Florida,

Plaintiff

vs.

ROYAL J. UNTREINER, Sheriff of Escambia County, Florida, et al,

Defendants.

- -

STIPULATION

The parties to this cause, by and between their undersigned attorneys, hereby stipulate and agree as follows:

1. Final hearing is hereby cancelled because all facts necessary for determination of the issues herein are now before the Court by affidavit or sworn complaint, and this cause is ready for summary final judgment.

2. Oral arguments on plaintiff's motion for summary judgment are waived.

3. All additional briefs must be filed with the Court on or before July 10, 1972.

s/Paul Shimek Jr.
Paul Shimek, Jr.
Attorney for Plaintiff

s/Hobart O. Worley, Jr.
Hobart O. Worley, Jr.
Attorney for Defendant, the Civil Service Board of Escambia County Florida

s/John R. Behr Jr.
for R. H. Merritt
Attorney for Defendant, Royal J. Untreiner, Sheriff of Escambia County, Florida